SINGAPORE REPORTS

GEBRUEDER BUEHLER A.G. v. PETER CHI MAN KWONG & 2 ORS.

[C.A. (Wee Chong Jin C.J., Lai Kew Chai & Chua JJ.) 9 March 1988]

[Singapore — Civil Appeal No. 70 of 1986]

Land Law — Machinery and equipment installed at factory premises — Whether chattels or fixtures — Whether company in whose premises the machinery was attached can sell the machinery.

This was an appeal by the appellants against the judgment of the High Court dated 13 August 1986, dismissing the appellants' claim that they retained all their rights, title and interest in certain items of machinery and spare parts ("the equipment") delivered by them to Allied Cocoa Industries Pte. Ltd., Singapore ("the company") and installed by the company at its factory [see [1987] 1 M.L.J. 356].

The appellants were manufacturers of machinery and equipment and they also provided for their erection and installation. The respondents were the receivers and managers of the company and were appointed by Bank of America National Trust and Savings Association ("the bank") pursuant to two deeds of debentures.

The company bought the equipment from the appellants and installed it at their premises. Thereafter, the company sought to sell off the equipment by a sale and purchase agreement ("the agreement") to a third party. The appellants, not having been paid the full purchase price of the equipment, filed an originating summons seeking, *inter alia*, the retention of their rights, title and interest in the equipment.

The learned judge who heard the suit dismissed the appellants' claims. The appellants then appealed to the Court of Appeal. Basically, the appellants put forward three contentions.

First, they argued that as the bank chose to appoint receivers instead of going into possession itself, this affected the undoubted "superior title" it would otherwise have had in relation to the proceeds of sale of its equipment. Secondly, the effect of the retention of title clause meant that the company had no power or right to annex the equipment to the land so as to make it a fixture and that the receivers, because they were agents of the company by clause 14 of the debentures, had no power or right to sell the equipment. Thirdly, the receivers were estopped by reason of the agreement from denying as against the appellants that the title was to remain in the appellants.

Held, dismissing the appeal: (1) once the mortgagee has entered into possession under his security, the previous owner is no longer entitled to sever and remove chattels which are attached to premises such that they had become trade fixtures, as the property in the chattels has passed to the mortgagee. It is, however, equally clear that if the mortgagee can be presumed to have authorized the removal of trade fixtures by the mortgagor, the owner will be entitled to sever and remove them whilst the mortgagor is still in possession but not after the mortgagee has taken possession, as any such licence to remove is terminated by the act of taking possession;

(2) in the present case, no argument was advanced that the mortgagee had impliedly authorized the removal of fixtures nor could it be advanced in view of the express prohibition against removal of trade fixtures found in the debentures;

(3) as to the second contention, the rules as to affixation of chattels owned by a third person to land owned by a company are general in character and equally affect a seller of chattels sold on terms that the seller shall remain the owner of the chattels until they are paid for. The appellants cannot therefore pray in aid the retention of the title clause as preventing the company from annexing the equipment in a manner which made it a fixture. The argument that the receivers had no power to sell the equipment was also fallacious;

(4) the court was also unable to accept the third contention of the appellants.

Cases referred to:

(1) *Holland* v. *Hodgson* (1872) L.R. 7 C.P. 328 (folld).
(2) *Hobson* v. *Gorringe* [1897] 1 Ch. 182 (folld).
(3) *Reynolds* v. *Ashby & Son* [1904] A.C. 466 (cited).
(4) *Ellis* v. *Glover & Hobson Ltd.* [1908] 1 K.B. 388, 396 (refd).
(5) *Gough* v. *Wood* [1894] 1 Q.B. 713 (refd).
(6) *Windsor Refrigerator Co. Ltd.* v. *Branch Nominees Ltd.* [1961] Ch. 375, 398 (refd).
(7) *R.A. Cripps & Son* v. *Wickenden* [1973] 1 W.L.R. 944, 954 (refd).
(8) *Re B Johnson & Co. (Builders) Ltd.* [1955] 1 Ch. 634, 644 (refd).
(9) *Bain* v. *Brand* (1875–1876) 1 App. Cas. 762, 772 (refd).

CIVIL APPEAL.

Leolin Price Q.C. (*A.J. Thambaiyah* with him) for the appellants.

Jonathan Parker Q.C. (*Goh Heng Leong* with him) for the respondents.

Cur. Adv. Vult.

Wee Chong Jin C.J. (delivering the judgment of the court): This is an appeal by the appellants against the judgment of the High Court dated 13 August 1986 dismissing the appellants' claim that they retained all their rights, title and interest in certain items of machinery and spare parts ("the equipment") delivered by them to Allied Cocoa Industries Pte. Ltd., Singapore ("the company") and installed by the company at its factory.

The appellants are a Swiss engineering company which manufactures machinery and equipment, and which also provides for their erection and installation for the manufacture of cocoa and

chocolate. The respondents are the receivers and managers of the company ("the receivers"), and were appointed on 27 February 1984 by Bank of America National Trust and Savings Association ("the bank") pursuant to two deeds of debenture dated 9 April 1980 and 2 September 1981.

The company was a Singapore registered company engaged in the business of making cocoa butter and cocoa powder. They erected their factory-premises at 342, Jalan Boon Lay, Singapore – a piece of land leased from Jurong Town Corporation for a term of 30 years commencing from 1 January 1980. The company was, however, let into possession of the land only on or before 13 June 1980 and the formal agreement was not executed until 16 September 1983. Nothing, however, turns on this. The company clearly had had an agreement for a lease, and, since 13 June 1980, an equitable leasehold interest in the land.

On 9 April 1980, the company executed a deed of debenture in favour of the bank to secure the payment of all monies and liabilities agreed to be paid under the deed of debenture, charging:

"Firstly – All the freehold and leasehold property of the company both present and future and the fixed plant machinery and fixtures (including trade fixtures) from time to time thereon.

Secondly – .....

Thirdly – The undertaking and all other property and assets of the company both present and future.

The charge hereby created shall as regards the premises first described be a first fixed charge and as to the premises secondly and thirdly described shall be a floating charge."

It is also relevant to recite the provisions of clauses 3 and 10(k) relating to express covenants by the company not to create any charge or lien on the property charged by the debenture, or to remove any fixtures.

"3. *Pari Passu* Charges

The company shall not without the consent in writing of the bank create any mortgage debenture or charge upon and so that no lien shall in any case or in any manner arise on or affect any part of the undertaking and property charged hereunder ranking either in priority to or *pari passu* with or ranking after the charges hereby created.

10. Covenants

The company hereby covenants with the bank that until the full and final payment of all its indebtedness to the bank, the company will –

(k) not dismantle pull down or remove any part of the buildings fixtures plant machinery and equipment, except in cases where such dismantling pulling down or removal shall in the opinion of the company be rendered necessary by reason of the same being worn out or damaged, in which case the company shall give sufficient written notice to the bank and will replace such property by property of similar nature and value;"

On 2 September 1981, a second deed of debenture was executed by the company with the bank for additional credit facilities. The terms of this debenture are, for all practical purposes, identical to the first and need not therefore be set out here. Clause 14 of each of those deeds, insofar as material, provides as follows:

"14. Powers of Receiver

A receiver so appointed shall be the agent of the company and the company shall be solely responsible for his acts and defaults and remuneration. Such receiver shall have power:

(a) to enter into and take possession or control of any land or premises of the company or any part thereof or collect and get in any property and assets comprised in this security and for that purpose to take any proceedings in the name of the company or otherwise as may seem expedient;

(b) .....

(c) .....

(d) forthwith and without restriction to sell or agree in selling (obtaining only when and where necessary the leave of the court) any of the company's property and assets comprised in this security or any part thereof (and for this purpose, to sever, if necessary, plant machinery and other fixture from the land) by public auction or by private contract on such terms and conditions as he may think fit, with power to vary any contract for sale and to resell without being answerable for any loss occasioned thereby; any such sale may be for cash, shares or stocks, debenture stock or other valuable consideration to be paid or satisfied at such time or times as the receiver shall think fit."

Particulars of the debentures were duly registered pursuant to the Companies Act.

From the beginning of 1981 and at various times thereafter up to 18 January 1982, the company ordered the equipment from the appellants under six separate contracts of sale for its installation in the factory premises. From November 1981 or thereabout, it was assembled and installed – together with machinery and equipment purchased elsewhere – to make up one entire processing and manufacturing plant for the manufacture of cocoa butter and cocoa powder. Each of those contracts

of sale made between the appellants and the company contained the following provision:

"4. Preservation of Rights of Property:

Buehler Brothers Ltd. shall remain proprietors of all their deliveries (machines spare parts and accessories) until payment of the full purchase price as well as any costs of erection which are to be charged to the customer and interest on arrears *etc.* has been completed. The buyer authorizes Buehler Brothers Ltd. to have registered the reservation of ownership at the buyer's expense on public registers or records under observation in the form and within the terms and limitations set forth by the laws of the respective countries and the buyer is obliged to give promptly any signatures requested from him for this purpose."
("Retention of title" clause)

In October 1982, the company started production but it fell into financial difficulties and defaulted in payment to the bank of monies secured by the debentures. On 27 February 1984, the respondents were appointed receivers and managers of the company by the bank pursuant to the two debentures. They took possession of the factory and all the properties and assets of the company, including the equipment, and carried on the business of the company. At this juncture, it has to be observed – as this is a point strongly relied upon by the appellants in argument before us – that the bank which appointed them had never at any time been in the position of a mortgagee in possession.

By a purchase and sale agreement dated 14 May 1984, the receivers purported to sell to the purchaser a company known as W.R. Grace & Company, with effect from the "completion date" (defined in clause 5(a) as "the date on which the completion of the purchase and sale shall occur"), the following properties and assets:

"(a) all that right, title and interest of the company in the property described in the First Schedule hereto and held by the company under an agreement to lease with the Jurong Town Corporation ... dated 16 September 1983 ... together with all buildings erected therein and fixtures comprised therein (hereinafter referred to as 'the property');

(b) those assets listed in the Second, Third and Fourth Schedules hereto and all other physical assets ... of the company, including but not limited to all plant and machinery together with available spare parts, electrical and air-conditioning installations, furniture and fixtures, office, factory and laboratory equipment, tools, implements, utensils, all motor and other vehicles, all documents of title relating thereto, and all other available books and records relating thereto, ... together with the benefit of all such suppliers' and manufacturers' warranties and guarantees in respect thereof as are in force on the completion date and are assignable (hereinafter together referred to as the 'assets');

(c) ..."

By clause 2(a) of this agreement, the purchase price, stated to be $31,300,000 for the property and assets, was apportioned as follows:

"(i) for the property (*viz.* the leasehold interest in the land with the factory) the sum of $13,200,000;

(ii) for the assets (*viz.* all the machinery and equipment, including the equipment) the sum of $18,099,999; and

(iii) for the benefits referred to in clause 1(c) hereof (*viz.* the purchase orders listed therein) the sum of $1."

It is also to be observed that the Sixth Schedule thereof gave notice of the retention of the title clause as follows:

"The conditions of sale of the suppliers of the equipment supplied under the following contract numbers contain or may contain provisions for retention of title to the supplier until the full purchase price is paid ..."

By a deed of assignment dated 28 June 1984, made between the receivers, the bank and the assignee, De Zann Far East (a subsidiary of W.R. Grace & Company), and expressed to be in consideration for the sum of $13,200,000, the bank:

"(1)... Assigns unto the assignee all the right title and interest under the agreement for lease in respect of the said land and premises described in the Schedule hereto ..."

The Schedule refers, in technical language, to the piece of land on which the factory premises were situated "together with the buildings erected thereon and fixtures comprised therein".

On 19 November 1984, the appellants, not having been paid the full purchase price of the equipment under the various contracts of sale, filed an originating summons seeking the determination of the court on the following question:

"Whether in the events which have happened the plaintiffs retained all rights, title and interest in:

(a) machinery, and
(b) spare parts

delivered to Allied Cocoa Industries Pte. Ltd., Singapore, pursuant to various contracts of sale made between Allied Cocoa Industries Pte. Ltd. and Gebrueder Buehler A.G. by virtue of clause 4 of the general terms and conditions of sale of the said contracts, which the defendants subsequently purported to sell."

and claiming that:

"In the event the above question is answered in the affirmative an order that:

(a) judgment be given against the defendants for loss and damage sustained and costs; and

(b) a reference be made to the Registrar to assess damages."

Thean J., who dealt with the originating summons, dismissed the appellants' claim, holding that the appellants had lost their title to the equipment. In his judgment dated 13 August 1986, the learned judge first considered the issue whether, for the purposes of the retention of title clause, the equipment had become so "integrated" with the plant such that it was no longer "identifiable", thus defeating the retention of title clause. His conclusion on this issue was that "the equipment, though they formed a part of the entire processing plant, remained unaltered and are clearly identifiable". This part of his judgment – which is adverse to the respondents – is not under appeal.

The learned judge then went on to consider – and it is his conclusion on this issue which is under appeal – whether (as counsel for the respondents had argued before him) the equipment, when installed in the factory, had been so "permanently fixed to the land or the building and become part of the land: *quicquid plantatur solo, solo cedit* (whatever is affixed to the soil belongs to the soil)" and that "the equipment had ceased to be chattels and passed with the land to the chargee, the bank". On this issue, he held that the equipment had become so affixed and that the appellants had lost their title to it.

In arriving at his conclusion on this issue, the learned judge treated the equipment as having become a fixture and so part of the land at the time(s) when it was supplied and incorporated into the plant and machinery and therefore passed by the mortgage to the bank. In this connection, he relied on a number of leading English cases, the most helpful of these being *Holland* v. *Hodgson,*[1] *Hobson* v. *Gorringe*[2] and *Reynolds* v. *Ashby & Son.*[3] The basic principle of these cases, as succinctly stated in Megarry & Wade's *Law of Real Property* 5th Ed. at p. 738, is that "if A hires machinery from B and fixes to the floor of A's factory, and the factory is mortgaged (whether prior to the fixing or not), the machinery becomes subject to the mortgage as against B". This primary rule governing fixtures, namely, that they become the property of the owner of the land, applies irrespective of the title of the person who affixes them. As Lord Lindley observed in *Reynolds* v. *Ashby,*[3] at p. 475: "The title to chattels may clearly be lost by being affixed to real property by a person who is not the owner of the chattels."

On the basis of these authorities, the learned judge essentially treated the question of the title, and therefore ownership, of the equipment between the competing parties as one which depended upon the question whether the equipment had become a fixture and so part of the land to which it had been affixed. Whether a chattel has become so affixed to land as to become part of it turns on the particular circumstances of each case, mainly, though not decisively, on the degree of annexation and the object of annexation – see the classic statement of the law by Blackburn J. in *Holland* v. *Hodgson*[1] (at p. 334) cited by the learned judge. The learned judge found, as a fact and after a personal inspection of the plant, that the "cocoa processing plant... was installed in the factory as an 'adjunct' to the factory and to improve its usefulness as a factory for manufacturing cocoa butter and cocoa powder". On this finding, therefore, his conclusion that the equipment had become a fixture and, therefore, part of the land was, as a matter of law, inevitable.

The finding of fact by the learned judge was, to a material extent, based on the judge's own inspection of the plant *in operation,* an inspection which convinced him that the object of fixing the equipment securely to the factory was not merely to keep it in a definite position and prevent it from being dislodged but was essential in order to enable the plant to function properly. It was on the basis of the inspection that he rejected the evidence to the contrary put forward on behalf of the appellants and expressed "complete agreement" with the evidence on this point by the respondents. The learned judge was, in our view, clearly entitled, on the basis of the affidavit evidence and on his own inspection, to find as he did, and this court would be loath – and it has not been suggested otherwise – to interfere with those findings, particularly since those findings were, to a large extent, based on the evidence of the judge's inspection of the plant in operation.

In this appeal, the appellants advanced a number of grounds of appeal. The first ground is that as the bank chose to appoint receivers instead of going into possession itself, this affects the undoubted "superior title" it would otherwise have

had in relation to the proceeds of sale of the equipment. The second ground is that the effect of the retention of title clause meant that the company had no power or right to annex the equipment to the land so as to make it a fixture and that the receivers, because they were agents of the company by clause 14 of the debentures, had no power or right to sell the equipment. The third is that the receivers were estopped by reason of the sale and purchase agreement dated 14 May 1984 from denying, as against the appellants, that the title was to remain in the appellants.

The first ground

The first ground of appeal is that the bank as mortgagee in the present case, unlike the mortgagees in the cases relied on by the learned judge, was never in the position of a mortgagee in possession, but instead chose to appoint receivers under the power in that behalf conferred by the debentures. It was conceded by the appellants that the learned judge's view of the matter might have been tenable had the bank entered into possession of the land as mortgagee. So the whole of the appellants' argument on this point depends upon the fact that instead of going into possession itself, the bank chose to appoint receivers. It was contended that because the bank chose that method of enforcing its security, it lost the "superior title" it would otherwise have had in relation to the proceeds of sale had it gone into possession itself. It therefore becomes necessary to examine the two leading authorities on this point, namely, *Hobson* v. *Gorringe*[2] and *Reynolds* v. *Ashby*,[3] to see if they could be distinguished on the ground suggested by the appellants.

In *Hobson* v. *Gorringe*,[2] the plaintiff let a gas engine to King under a hire purchase agreement which provided that it should not become the property of the hirer until the payment of all instalments and should be removable by the plaintiff upon default of any instalment. King affixed the engine to his land in such a way as to make it a trade fixture. He mortgaged the land to the defendant, who, when King became bankrupt, entered upon the land and took possession of the engine. The plaintiff sued to recover the engine or the proceeds of its sale. His claim was dismissed.

The primary ground for the decision is to be found in the following passage in the judgment of A.L. Smith L.J. (at p. 192):

"It seems to us that the true view of the hiring and purchase agreement, coupled with the annexation of the engine to the soil which took place in this case, is that the engine became a fixture – *i.e.* part of the soil – when it was annexed to the soil by screws and bolts, subject as between Hobson (the owner) and King (the hirer) to this, that Hobson had the right by contract to unfix it and take possession of it if King failed to pay him the stipulated monthly instalments. In our opinion, the engine became a fixture – *i.e.* part of the soil – subject to this right of Hobson which was given him by contract. But this right was not an easement created by deed, nor was it conferred by a covenant running with the land. The right, therefore, to remove the fixture imposed no legal obligation on any grantee from King of the land. Neither could the right be enforced in equity against any purchaser of the land without notice of the right, and the defendant Gorringe (the mortgagee) is such a purchaser. The plaintiff's right to remove the chattel if not paid for cannot be enforced against the defendant, who is not bound either at law or in equity by King's contract."

The court thus proceeded on the basis that the hire purchase agreement, conferring as it did only a contractual right against the hirer to remove the engine, could not affect the position of the mortgagee, for, although it might not be the intention of the owner of the engine that it should become a fixture, at least until the agreement was completed, the agreement was unknown to the mortgagee of the land and could not be enforced against him. It is true that in this case, the mortgagee entered into possession of the mortgaged property, but this had the effect only of determining any implied authority .the mortgagee might have given to the plaintiff to remove the engine by leaving the mortgagor in possession. This is made clear by the following *obiter* statement of A.L. Smith L.J. (at p. 189):

"Even if in the present case a licence had been granted by Gorringe to King to remove the gas engine during the continuance of a term, neither of which conditions in fact existed, Gorringe, by entering and taking possession of the land and engine, would have determined such licence."

In *Reynolds* v. *Ashby*,[3] the facts as set out in the headnote are as follows:

"Machines were supplied by the owner (the appellant) of them to the lessee (Holdway) of a factory upon the hire purchase system, the machines to remain the property of the owner till they had been wholly paid for; upon default in payment the owner to have power to determine the hiring and remove the machines. They were affixed, as the owner knew, to concrete beds in the floor of the factory by bolts and nuts, and could have been removed without injury to the building or the beds. The lessee made default in payment, and the owner brought an action to recover the machines or their value from a mortgagee of the premises who had taken possession."

In his judgment, Lord Lindley said (at pp. 472–473):

"The question is whether they passed by the mortgage. But for the fact that the mortgagor had not paid for them the question would not in my opinion be open to the slightest doubt. There is a long series of decisions of the highest authority shewing conclusively that as between a mortgagor and a mortgagee machines, fixed as these were to land mortgaged, pass to the mortgagee as part of the land. The decisions in question ... include *Hobson* v. *Gorringe* ... it is quite impossible to overrule these decisions."

At p. 474, he dealt with the actual case as follows:

"I pass now to consider whether in this case the fact that the mortgagor Holdway had not acquired the ownership of the machines by paying for them entitles the appellant to recover their value from the defendants. *The title to chattels may clearly be lost by being affixed to real property by a person who is not the owner of the chattels* ... Holdway agreed to buy the machines; but the appellant knew what he wanted them for, and that before paying for them he intended to put them up in his factory and to use them. The appellant knew that the factory was mortgaged, and ran the risk of the machines being claimed as fixtures. In effect, Holdway was authorized by the appellant to convert the chattels into fixtures, subject to the right of the appellant to enter and retake them if Holdway did not pay for them."
(emphasis added)

Lord Lindley then went on – and this is the crucial passage – to give a further ground for his decision (at p. 475):

"But, apart from this knowledge and authority, the result would be the same, although not so obvious. *After the machines were fixed and before the appellant claimed them, the second mortgagee took possession; the appellant's right to enter and remove the machines, resting as it did on his contract with Holdway, ceased to be exercisable.* The appellant has no greater rights against the defendants than he had against the second mortgagee, whose rights the defendants have acquired. *The machines had ceased to be chattels belonging to the appellant; they were not chattels wrongfully detained by the defendants. The machines had become fixtures which the appellant was not entitled to remove from the possession of the mortgagees.*"
(emphasis added)

These cases show that *once the mortgagee has entered into possession under his security*, the previous owner is no longer entitled to sever and remove chattels which are attached to premises such that they had become trade fixtures, as the property in the chattels has passed to the mortgagee. It is, however, equally clear that if the mortgagee can be presumed to have authorized the removal of trade fixtures by the mortgagor, the owner will be entitled to sever and remove them *whilst the mortgagor is still in possession*, but not after the mortgagee has taken possession, as any such licence to remove is terminated by the act of taking possession. As Fletcher-Moulton L.J. put it in *Ellis* v. *Glover & Hobson Ltd.*[4] when considering the effect of *Gough* v. *Wood*,[5] *Hobson* v. *Gorringe*[2] and *Reynolds* v. *Ashby*[3]:

"these cases decide that in general a mortgagor in possession has the right to permit trade fixtures to be fixed and unfixed on the premises, provided that they are unfixed before the mortgagee takes possession, but that the right to unfix them ceases when possession is taken by the mortgagee ... it is undoubted law that the mortgagor would have been entitled to fix and unfix trade fixtures, provided only that they were unfixed by him before he had been turned out of possession. This no doubt accounts for the importance attached in the later cases to the mortgagee having taken possession while the fixtures were still on the premises."

As *Ellis'* case[4] itself shows, any such presumption of authority from the mortgagee to the mortgagor is a question of fact depending upon all the circumstances of the case and will clearly be displaced by an express covenant by the mortgagor not to remove.

In the present case, the appellants relied heavily on the fact that the bank as mortgagee was never in possession of the mortgaged property as a factor serving to distinguish these cases from the present case. But, as the above analysis shows, this factor is only relevant to the argument that by leaving the mortgagor in possession, the mortgagee impliedly authorizes him to remove trade fixtures, *not* to the argument whether chattels which have been fixtures pass to the mortgagee as part of the land. Indeed, in the present case, no argument was advanced that the mortgagee has impliedly authorized the removal of fixtures, nor, in our opinion, could it be advanced in view of the express prohibition against removal of trade fixtures (save on replacement terms) found in clause 10(k) of the debentures as set out earlier (*supra*). The present case is thus indistinguishable from the cases relied on by the learned judge and, in our view, the learned judge was entirely right to apply the principles laid down in those cases in reaching his decision that the equipment had ceased to be chattels and as fixtures had passed by the mortgage to the bank.

The second ground

The second ground of appeal advanced by the appellants concerns the effect of the retention of title clause on (a) the company's right or power to sell the equipment. With regard to (a), the appellants argued that the retention of title in the appellants meant that the company had no right or power so to annex the equipment so as to deprive

the company of its ability to honour or give effect to (and/or the appellants of the benefit of) the contractual retention of title clause. This argument amounts, in effect, to saying that the effect of the retention of title clause is to prevent the equipment from ever becoming a fixture and thus becoming part of the realty by annexation (since, as was said by Lord Lindley in *Reynolds* v. *Ashby*[3] at p. 475, "the title to chattels may clearly be lost by being affixed to real property by a person who is not the owner of the chattels"). In this context, the judgments in *Hobson* v. *Gorringe*[2] and *Reynolds* v. *Ashby*[3] make it clear that the mere fact that the chattel is let on hire on terms that it shall not be the property of the hirer until that is paid for is not sufficient to prevent it from being a fixture. The test of annexation, in the words of A.L. Smith L.J. in *Hobson* v. *Gorringe*[2] at p. 193, depends "*not* (upon) circumstances of a chance agreement that might or might not exist between an owner of a chattel and a hirer thereof" but rather upon "circumstances which shewed the degree of annexation and the object of such annexation which were patent for all to see". "How a *de facto* fixture becomes not a fixture or is not a fixture as regards a purchaser of land for value without notice by reason of some bargain between the affixers we do not understand, nor has any authority to support this contention been adduced" (per A.L. Smith L.J. at p. 159). Similarly, in *Reynolds* v. *Ashby*[3] at p. 472, Lord James rejected the argument that "as Holdway (the hirer) had not paid for the machines they remained the property of the appellant, and could not by any act of Holdway (the hirer) be dealt with as fixtures". In our view, these rules as to affixation of chattels owned by a third person to land owned by a company are general in character and, equally, affect a seller of chattels sold on terms that the seller shall remain the owner of the chattels until they are paid for. The appellants cannot, therefore, pray in aid the retention of title clause as preventing the company from annexing the equipment in a manner which made it a fixture.

With regard to (b), the appellants argued that since, by clause 14 of the debentures, the receivers were agents of the company, they did not have the power or right to sell the equipment, since the company itself lacked power or right to sell by reason of the retention of title clause. If this argument is correct, it would of course produce alarming results for mortgagees and receivers alike. But it is, in our view, fallacious for the following reasons. In the first place, the argument is based on the premise that the company acted in breach of its contract towards the appellants in selling the equipment. But this overlooks the fact that the sale was concluded by the receivers appointed under the debentures, by the terms of which the company had agreed that the receivers properly appointed could take possession of its assets and could bind the company to sell those assets – see, in particular, clause 14(a) and (d). In the second place, the argument is based on a misapprehension of the true object and purpose of the agency clause in clause 14. The receivers' agency for the company does not place the receivers appointed by the debenture holder on the same footing as the chargor company. They are appointed primarily to realize the debenture holder's security, not to run the company for the benefit of the mortgagor, or for that matter, the creditors. As Donovan L.J. said in *Windsor Refrigerator Co. Ltd.* v. *Branch Nominees Ltd.*,[6] quoted by Goff J. (as he then was) in *R.A. Cripps & Son* v. *Wickenden*:[7] "What the debenture holder wants to do is to levy equitable execution, and for that purpose to have some person in being clothed with the necessary authority to take possession of the company's property ... and the company has to submit to the exercise of these powers by the person having such authority." The power therefore to bind the company (by acting as its agents) is given for this primary purpose of enabling the receivers to realize the debenture holder's security. As Evershed M.R. said in *Re B. Johnson & Co. (Builders) Ltd.*,[8] "that is the whole purpose of his appointment, and the powers which are conferred upon him, ... are really ancillary to the main purpose of the appointment, which is the realization by the mortgagee of the security (in this case, as commonly) by the sale of the assets". Indeed, it may even be said that in those cases in which a power of sale is expressly conferred upon a receiver, the duties in connection with the exercise of this power may be equated to those of a mortgagee exercising his power of sale. So, for example, in *Re B. Johnson & Co. (Builders) Ltd.*[8] at p. 662, it was said, *obiter*, "his power of sale is, in effect, that of a mortgagee" (per Jenkins L.J.). In the third place, the method of enforcement of the security cannot, on principle or authority, affect the extent of the property charged. That would be flatly contrary to the principle that so long as a chattel which is affixed to the land remains a fixture, the title to it must remain in the owner of the land.

The third ground

The third and final ground of appeal concerns the effect of the sale of the equipment by the

receivers. The sale and purchase agreement dated 14 May 1984 treated the equipment as chattel, not as land or fixtures and, in the Sixth Schedule, gave notice of the retention of title in the appellants. It was therefore argued that the receivers were estopped from asserting, as against the appellants, that title did not remain in the appellants. This was expressed, as in argument before the learned judge, that the receivers cannot approbate (assert title to act as the company's agents) and reprobate (assert power as such agents to do what the company and its agents as such could not do) or simply as an example of estoppel by convention (the convention obliging the receivers to adhere to a state of facts which they have declared to be assumed as true for the purposes of a particular transaction).

The learned judge had no difficulty in rejecting the argument. He said:

"The equipment had become part of the land long ago, at least since October 1982 when the factory became operational and production began. Therefore, the plaintiff had lost their title to the equipment long before the sale and what they had lost they could not and did not regain. It follows that in whatever manner the defendants treated the equipment in the sale in May 1984 could not possibly revive the plaintiff's title to the equipment."

In argument before us, the appellants sought to contend that as the equipment was sold as machinery and not part of the land, it was sold as if severed from the land. We are unable to accept this submission. In the first place, physical severance is clearly necessary in order for a fixture to revert to the character of chattel. It is common ground that no such physical severance took place. The most that can be said is that there could, in law, be some form of "notional severance", for which there is no authority in support. In our opinion, such a proposition is clearly untenable. In *Bain* v. *Brand*,[9] Lord Chelmsford said: "As the personal character of the chattel ceases when it is fixed to the freehold, it can never be revived as long as it continues so annexed." In the second place, as the learned judge found, the equipment had clearly become a fixture long before the sale, at least sometime in October 1982 when production in the factory began. By the time of the sale, therefore, the appellants' title to the equipment had been entirely extinguished when it turned into land and, accordingly, the receivers were free to deal with the property of the company (which included the equipment) in accordance with the debentures. The form of documentation employed by the receivers to dispose of the property of the company could not, therefore, possibly "revive" the appellants' title to the equipment in any way. In the third place, it cannot be assumed that the receivers intended to deal with the equipment in a way which would be outside their powers and contrary to law. The receivers' intention must have been to enforce the bank's security – not to convert fixtures into chattels. There is clearly no evidential basis for any assertion to the contrary. Indeed, the receivers' intention must have been to pass title to the fixtures by the assignment dated 28 June 1984 (which is expressly made by the bank in the exercise of its statutory power of sale as mortgagee) by which the title to the fixtures passed and could only have passed. This was always intended, as the sale of the equipment by the sale and purchase agreement was to be completed by the assignment (see, for example, clause 5(a) of the sale and purchase agreement).

For all these reasons, we would dismiss the appeal with costs.

Appeal dismissed.

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TONG BEE FINANCE CO. LTD. v. SUNLAND MONSTREAL TRADING (S) PTE. LTD.

[C.A. (Lai Kew Chai & Thean JJ. & Chan Sek Keong J.C.) 12 February 1988]

[Singapore – Civil Appeal No. 31 of 1986]

Hire Purchase – Dispute as to facts – Allegation that hire purchase agreement was void – "Dealer" – Definition of – "Transaction" – Meaning of – Hire Purchase Act (Cap. 125, 1985 Ed.), ss. 2, 30, 31 & 33.

The appellants agreed to let to the respondents a truck under a hire purchase agreement. The respondents did not pay the monthly instalments and therefore the appellants repossessed the vehicle and sold it to a third party. The appellants then claimed liquidated damages from the respondents.

The respondents resisted the claim. They contended:

(i) that the transaction was not one of hire purchase but a loan and the hire purchase agreement was a cloak to conceal the true substance of the transaction of a loan and was a bill of sale given by way of security;

(ii) that the appellants had contravened section 33(b) of the Hire Purchase Act (Cap. 125, 1985 Ed.) in that